Supreme Court, U.S.
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No. 01-

IN THE

# Supreme Court of the United States

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

*Petitioners,*

*v.*

SHERIFF I. F. HINGLE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Commerce Clause is violated by a $293,600 sheriff's fee taxed for service of a writ as part of a prejudgment attachment procedure that facially discriminates against nonresidents who bring property into the state?

## STATEMENT PURSUANT TO RULE 29.6

K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI were limited partnerships. Shortly after the respondent's accident, Smedvig Tankships, Ltd. became the holding company for Smedvig Tankships (Agencies), Ltd., and the holding company for Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/k/a/ Smedvig Tankrederi A.S., and Peder Smedvig Singapore, Pte., Ltd. During the pendency of the suit, Bona Shipping A/S became the parent company of Smedvig Tankships, Ltd., through purchase.

In June of 1999, Bona Shipping A/S was acquired by Teekay Shipping Corporation. Teekay Shipping Corporation is publicly traded on the New York Stock Exchange. Cirrus Trust & JTK Trust beneficially own more than 10% of the common stock of Teekay Shipping Corporation.

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Appendix I — Excerpts From Application For Writ Of Certiorari Dated June 14, 2001 ..... 58a

Petitioners herein respectfully pray that a writ of certiorari issue to review the Judgment of the Louisiana Court of Appeal, Fourth Circuit, entered in this action on April 11, 2001.

## OPINIONS BELOW

The district court opinion is not reported. It is reproduced in Appendix C.

The opinion of the Louisiana Court of Appeal, Fourth Circuit, is reported at 786 So.2d 827 (La. App. 4th Cir., 4/11/2001), and it is reproduced in Appendix A. Petitioners' request for rehearing of that decision was denied on May 15, 2001. That denial of rehearing was not reported but is reproduced in Appendix B. The Louisiana Supreme Court denied petitioners' writ application on September 28, 2001, which denial is published at 798 So.2d 117 (La. 9/28/01), and it is reproduced in Appendix D.

## STATEMENT OF JURISDICTION

The Judgment of the Louisiana Court of Appeal, Fourth Circuit, was entered in this action on April 11, 2001. The Order of the Supreme Court of the State of Louisiana denying review was entered on September 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Under the circumstances, 28 U.S.C. § 2403(b) may be applicable and petitioners certify this petition has been served upon the Attorney General for the State of Louisiana.

## CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

**The United States Constitution, Article I, Section 8, Clause 3:**

> The Congress shall have power . . . to regulate Commerce with foreign nations, and among the several States . . .

**La. Code of Civil Procedure, Art. 3541. Grounds for attachment**

> A writ of attachment may be obtained when the defendant:
>
> . . .
>
> (5) Is a nonresident who has no duly appointed agent for service of process within the state.

**La.R.S. 33: 1428. Fees in civil matters**

> A. Sheriffs shall be entitled to no more than the following fees and compensation of office in all civil matters:
>
> . . .
>
> (7)(a) For commission on sales of property made by the sheriffs, . . . six percent shall be allowed on the price of adjudication of movable property.

As used herein, "the price of adjudication" shall mean the amount of the successful bid price at the sale conducted by the sheriff.

. . .

(13)(a) In all cases where the sheriffs have in their possession for execution . . . any conservatory or other writ under which property is or may be seized:

(i) When there has been an adjudication which is not completed as a result of instructions given by the plaintiff in writ or for any other reason, or

(ii) When the plaintiff in writ receives cash, other consideration, or both pursuant to judgment rendered in suit in which the writ issued without the necessity of judicial sale, or

(iii) When the suit in which the writ issued is discontinued by the plaintiff in writ, or

(iv) When at the request of the plaintiff in writ the writ is recalled or dissolved

> or its further execution discontinued, or
>
> (v) When the parties in interest make an amicable settlement or compromise or enter into any other agreement under the terms of which the writ is recalled or dissolved or its further execution discontinued,
>
> the sheriffs shall be entitled to receive a fee or commission as in the case of a sale . . .

## STATEMENT OF THE CASE

### 1. Statement of Relevant Facts

This petition for certiorari arises from sheriff fees being assessed as a result of petitioners' failure to register to do business with the State of Louisiana when bringing a ship into the Mississippi River. The size of the fee ($293,600) is grossly out of proportion to the cost of the service provided ($1,260) and so is unquestionably a tax.

The underlying dispute began on May 26, 1993, when Philippine seaman Carlos Valdez suffered a serious injury on the high seas while working aboard M/V VESTRI, a foreign owned and foreign flagged vessel. In August 1994, VENITA, a ship under common management with VESTRI, but with no connection to the Valdez accident, came into the Mississippi River to discharge cargo at the request of her charterer.

Valdez had already retained United States counsel. Without any prior notification to owners or managers of VENITA, Valdez's counsel filed suit in a Louisiana state court on August 22, 1994, for unliquidated damages in an unspecified amount, and had the court issue a prejudgment writ of attachment of VENITA that same day. The basis for the issuance of the writ and the prejudgment attachment of VENITA was the nonresidency of her owner, the owner's failure to register with the state of Louisiana to do business, and the presence of VENITA in Louisiana waters.

The Louisiana nonresident attachment statute specifically allows for the prejudgment attachment of property on the sole basis that a defendant is a nonresident without a "duly appointed" agent for service of process in the State. Under Louisiana law, a corporation does not have a duly appointed agent for service of process unless it has registered to do business in the state. *Balashov v. Baltic Shipping Company*, 96-1129, (La.App. 4th Cir. 1/22/97), 687 So.2d 1101, *writ denied*; 97-0487, (La. 4/18/97), 692 So.2d 449. However, by such registration with the state, a nonresident subjects itself to jurisdiction in the state for all suits regardless of their connection with Louisiana. The owners and managers of VENITA were not registered to do business in Louisiana.

The VENITA remained under attachment for three days. On August 25, 1994, she was released upon the petitioners' provision of a letter of undertaking to the plaintiff. The actual cost to the Plaquemines Parish Sheriff's Office of the service of the suit and writ of attachment was $1,260. Appendix F, pp. 31a-36a. Nevertheless, on January 15, 1999, after trial and judgment on the main demand, Sheriff Hingle moved

under La. R.S. 33:1428 to recover a commission of $293,600 (6% of the amount of the underlying $4,893,339 judgment). Judgment was rendered on September 10, 1999 in favor of the sheriff and against defendants for the entire $293,600.

The sheriff's statutory entitlement to the 6% fee arose simply upon the sheriff's receipt of the writ of attachment for execution. Thus, the mere issuance of the prejudgment writ by the court, which occurred entirely *ex parte*, provoked the petitioners' obligation to pay a 6% fee on any subsequent related settlement or judgment, irrespective of the actual costs of the services provided by the sheriff, and before defendants were even notified of the filing of the suit.

Petitioners seek review of the Constitutionality of this sheriff's fee, a tax assessed solely because petitioners allowed their vessel to call in Louisiana on unrelated business and because they did not register to do business in Louisiana. Resident shipowners are not subject to such prejudgment attachments absent special circumstances and thus are not routinely subject to the tax.

## II. How The Federal Question Presented Was Raised And Passed upon in the State Courts

On January 15, 1999, after trial and judgment on the main demand, Sheriff I. F. Hingle first appeared in the proceedings by motion and sought a sheriff's fee in the amount of $293,600 (6% of the underlying judgment) for his receipt of the prejudgment writ of attachment issued four years earlier. No answer or responsive pleading was required of defendants/petitioners to this motion. Petitioners filed an opposition to the motion and in that opposition argued that Louisiana law prohibited the taxing of such costs to

petitioners, and that if the statute were to be construed otherwise, it would be in violation of the Commerce Clause. Appendix E. Petitioners reasserted the Constitutional argument in a supplemental opposition to the trial court. Appendix F. At oral argument on Sheriff Hingle's motion, petitioners again asserted the Constitutional issue. The district court taxed the fee against the petitioners, and issued judgment in favor of Sheriff Hingle and against petitioners on September 10, 1999. No written or recorded reasons were given by the trial court judge for his decision on the issue.

Petitioners appealed the judgment to the Louisiana Court of Appeal, Fourth Circuit, and in that appeal re-urged the Commerce Clause issue. Appendix G. The appellate court affirmed the lower court decision, but refused to address the Constitutional issue. Petitioners sought rehearing, again specifically asserting a violation of the Commerce Clause. Appendix H. Rehearing was denied. Petitioners sought review from the Louisiana Supreme Court, asserting again that the assessment of the sheriff's fee was unconstitutional as a violation of the Commerce Clause. Appendix I. The Louisiana Supreme Court denied the writ application.

## REASONS FOR GRANTING THE WRIT

### I.

### It is a Tax

The consequences of a prejudgment attachment of property in Louisiana include not only loss of the property during the pendency of the suit, but also a 6% sheriff's fee on the litigation proceeds. This "fee" is in actuality a tax.

It is due regardless of whether the attachment is actually consummated, regardless of whether the litigation is settled or tried, and regardless of whether security is placed in the court in lieu of the property attached. The simple receipt of the writ of attachment in the sheriff's office for execution triggers the tax. La.R.S. 33: 1438, § 13(a). The fee is not in proportion to the services rendered. In this case, it was stipulated that the entire cost to the sheriff of the service of the writ, the attachment of the property, and the temporary custodial expenses, was $1,260.

A disproportionate fee is a tax. The sheriff's fee of $293,600 for a $1,260 service is a tax.

## II.

### It is a Discriminatory Statute

Louisiana has a prejudgment attachment statute that singles out nonresidents for different treatment than residents. Special circumstances are required in order to effectuate the attachment of a resident's property, and a bond in the amount of the claim must be posted by plaintiff as security. La. Code of Civ. Procedure, Art. 3544. A nonresident's property is subject to prejudgment attachment without any showing of special circumstances and with the posting of only a $250 bond. *Id.* The grounds for attachment of a nonresident's property are simply nonresidency, failure to register with the Secretary of State to do business in Louisiana, and the presence of the property in the state. *Alessi v. Belanger*, 98-2047 (La.App. 1 Cir., 10/7/94); 644 So.2d 778.

## III.

### It is a Burden on Commerce

The lower 200 miles of the Mississippi River are located entirely within the state of Louisiana, and contain some of the busiest and largest ports in the nation. If a foreign shipowner brings its vessel into the Mississippi River for any purpose, including the simple discharge of cargo, it will be subject to the threat of a prejudgment attachment of its ship for any outstanding claim and, as a consequence, the 6% tax on litigation proceeds. The property need not be related in any way to the underlying suit. In contrast, a Louisiana shipowner is not subject to prejudgment attachment of its property in a Louisiana state court, absent special circumstances, and so does not have to pay the 6% tax. Similarly, a nonresident who does not bring property into the state cannot be subject to the 6% tax because there is no basis for the issuance of the prejudgment writ.

In this case, knowing that the seaman had suffered a serious injury and that he was represented by U.S. counsel, the foreign shipowner faced the following choices: either allow ships it managed to engage in commerce in Louisiana and risk the 6% surcharge on the amount recoverable by the seaman (which amount was at that time unliquidated); or refrain from having vessels it managed enter the Mississippi River until after the 3 year prescriptive period had run; or register to do business in Louisiana and subject itself to personal jurisdiction for suits in Louisiana that have no relationship with Louisiana. Each choice is a serious burden on foreign commerce.

Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it does not have the minimum contacts necessary for supporting personal jurisdiction, has been recognized by this court as a significant burden on commerce. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc., et al.*, 486 U.S. 888, 893 (1988); *see also Crutcher v. Commonwealth of Kentucky*, 141 U.S. 47 (1891); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). There can be no question but that the 6% tax is a burden on interstate and foreign commerce. Obviously, the third choice that requires refraining from bringing a ship into the navigable waters of the state is even more than a burden. It is a deterrent to commerce.

## IV.

### As a Tax, It Violates the Commerce Clause

A state's power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against interstate or foreign commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). To sustain a Commerce Clause challenge, a state tax must survive a four-part text. It must [1] be applied to an activity with a substantial nexus with the taxing State, [2] be fairly apportioned, [3] not discriminate against interstate commerce, and [4] be fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The activity in question is the prejudgment attachment of petitioner's property. The only nexus with the state is the action of the Parish government (the court and the Sheriff).

The other three tests are not met. The tax is not fairly apportioned. While it is applicable even to residents who may have a prejudgment attachment of their property, there must be a special showing to allow the court to issue such a writ for residents. Nonresidents, on the other hand, can have their property attached solely because of their status as nonresidents. Therefore, the tax should fail because it is not applied fairly. Similarly, the tax discriminates against interstate commerce by discriminating against persons who engage in commerce (bringing property in or out of the state) but who are not residents of Louisiana and have not registered to do business in the state. Finally, the tax is not fairly related to the services provided by the sheriff. In this case, the tax ($293,600) is more than 200 times the value of the services rendered ($1,260).

## V.

## As a Discriminatory Statute, It Violates the Commerce Clause

A restriction on commerce that is discriminatory is virtually *per se* invalid. *Oregon Waste Systems v. Department of Environmental Quality of Oregon*, 511 U.S. 93 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The facially discriminatory Louisiana prejudgment attachment statute creates a heavy burden on commerce, especially as applied to vessels owned by nonresidents. Facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose. The tax must be invalidated unless respondents can show that it advances a legitimate local purpose that cannot be served adequately by a reasonable nondiscriminatory alternative. In this case, the excessive fee has no purpose. The state could easily have limited the sheriff

to a reasonable fee for his services, instead of charging over $290,000 in excess of costs. Alternatively, the state could have applied the same standard for prejudgment attachment of property to nonresidents as it did to residents.

*Shaffer v. Heitner*, 433 U.S. 186 (1977), removed any justification for a prejudgment attachment procedure that discriminates against nonresidents. Had plaintiff chosen to proceed without the nonresident attachment of the property, there would have been no sheriff fee assessed other than for the normal incidents of litigation. Had defendants refused to allow a vessel it managed to call in the State, the suit would have progressed without the attachment and the exorbitant tax on the litigation proceeds. The critical offense to the Commerce Clause is that the foreign shipowner was taxed because it brought its vessel into the state.

Even under the lesser "balancing test" standard of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the statute violates the Commerce Clause. When a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute. *Edgar v. MITE, Corp.*, 457 U.S. 624 (1982). Here, the only local interest served is the enrichment of the local sheriff's office.

## CONCLUSION

Louisiana coupled a 6% tax with a prejudgment attachment procedure that discriminates against nonresidents. The procedure is unquestionably a burden on interstate and foreign commerce. There is no justification for subjecting a shipowner to a 6% tax on litigation proceeds solely on the basis of its status as a nonresident and the fact that it allowed a ship unrelated to the underlying dispute to come into the State to discharge cargo.

Taxes on foreign corporations that discriminate against them for no other reason than their state of incorporation have repeatedly been struck down by this Court as violating the Commerce Clause. This tax should not be allowed to stand.

Respectfully submitted,

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